1-1004-14523-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Barberton Rescue Mission, Inc., Christian Brotherhood Newsletter, aka CBN, and Christian Brotherhood Newsletter, Inc., aka CBN, Inc.

RECOMMENDATION FOR SUMMARY DISPOSITION

By written cross-motions filed on April 14, 2003, the Department of Commerce ("the Department") and the Barberton Rescue Mission, Inc. ("BRM") the Christian Brotherhood Newsletter and the Christian Brotherhood Newsletter, Inc. ("CBN" or "newsletter") (and collectively "the Respondents") each filed a Motion for Summary Disposition in this matter. John and Lynne Cooke filed a memorandum in support of the Respondents' cross-motion for summary disposition on April 14, 2003. Each party and the Cookes filed a reply to the Motions on May 16, 2003. The Motions were the subject of oral argument on May 22, 2003 at the Office of Administrative Hearings, and on that date the OAH record closed.

Jennifer S. Kenney, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared representing the Department. The Respondents were represented by Barry S. Brown, Esq., Suite 203, 1050 North Point Road, Baltimore, MD 21224; Jeffrey J. McNaught, Esq., Lindquist & Vennum, PLLP, 4200 IDS Center, 80 S. 8th Street, Minneapolis, MN 55402; and Thomas F. Pursell, Esq., Lindquist & Vennum, PLLP, 444 Cedar Street, Suite 1700, St. Paul, MN 55101. The Cookes are represented by William M. Hart, Esq. and Jenneane L. Jansen, Esq., Meagher & Gear, PLLP, 33 S. 6th Street, Suite 4200, Minneapolis, MN 55402.

Based upon the submissions by the parties and the Cookes, the oral argument, and for the reasons set out in the attached Memorandum,

IT IS HEREBY RECOMMENDED:

1. That the Motion for Summary Disposition by the Respondents be GRANTED.

2. That the Motion for Summary Disposition by the Department of Commerce be DENIED.

3. That the Cease and Desist Order issued on June 20, 2001, be rescinded.

Dated this 18th day of June 2003.

S/ George A. Beck
GEORGE A. BECK
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Glenn Wilson, Commissioner, Minnesota Dept. of Commerce, 85 Seventh Place E., Suite 500, St. Paul, MN 55101 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

MEMORANDUM

Procedural Matters

The Commissioner of Commerce initiated this matter on June 20, 2001, by issuing a Cease and Desist Order against the Christian Brotherhood Newsletter alleging that the newsletter was engaging in the business of insurance in Minnesota without a license or certificate of authority to do so.[1] CBN requested a hearing on the Cease and Desist Order. The parties agreed to waive the 10-day time period for setting a contested case hearing. They also agreed that CBN would not solicit or accept any new business in Minnesota pending the final resolution of this matter, but that it could continue to collect and distribute money to existing Minnesota subscribers. On October 25, 2001, the Commissioner issued a Notice of and Order for Hearing to determine whether the Cease and Desist Order should be made permanent, vacated or modified. This contested case proceeding followed.[2] The parties engaged in an extensive discovery process during 2002 and on April 14, 2003 each party filed a Motion for Summary Disposition.

John and Lynne Cooke, who are subscribers to the newsletter, sought to intervene as parties in this matter. That petition was denied but the Cookes were allowed to file a memorandum in support of the Respondents' Motion for Summary Disposition without acquiring party status. Barberton Rescue Mission, Inc. operated the Christian Brotherhood Newsletter from its beginning until July 13, 2001 when a new corporation, known as the Christian Brotherhood Newsletter, Inc., began operating the newsletter completely separate from BRM. The Respondents' Motion to Dismiss BRM from this proceeding was denied on the grounds that it operated the newsletter when the Cease and Desist Order was issued on June 20, 2001.

Facts

The Christian Brotherhood Newsletter began operation in 1982. It has been doing business in Minnesota since at least October 1989 and continuing to the present. The Respondents have had as many as 282 Minnesota subscribers and as of April 2002 had 94 active Minnesota subscribers.[3]

CBN distributes a "Fact Pak," as a marketing tool, in which it describes itself as "a Christian ministry which publishes a monthly newsletter where subscribers voluntarily choose to share each other's medical expenses in an effort to fulfill the scriptural admonition to "bear ye one another's burdens" (Gal 6:2)." The Fact Pak states that the newsletter has 15,000 subscriptions involving 50,000 individuals.[4] The Fact Pak also states that:

> The Christian Brotherhood Newsletter is not insurance and therefore makes no guarantee that other subscribers will help you with your medical bills. However, we have been in continuous operation since 1982. More than 50,000 individuals participated in 1999. These participating subscribers helped one another with millions of dollars in medical bills![5]

That Fact Pak contains a prequalification or application form that requires disclosure of the family health history and requires the subscriber to attest that participating adult members are Christians by biblical principles, attend church regularly, and totally abstain from alcohol, tobacco, illegal drugs and any homosexual lifestyle. The form asks how many units (or qualifying family members) are subscribing and asks the subscriber to enroll in either a gold, silver or bronze program.[6]

As of October 24, 2000, the gold plan provided 100% of qualifying medical bills after $500 per illness or accident, doctor visits, diagnostic tests, outpatient surgery, prescriptions, limited maternity expenses, hospital stay with supplies and services, with a maximum of $125,000 per illness.[7] The silver plan had the same benefits but covered only medical bills incurred while in the hospital or qualifying outpatient center, hospital and surgery bills after $1,000, and provided no office visits, diagnostic tests or prescriptions. The bronze plan provided the same benefits as the silver plan, but covered only hospital and surgery bills after $5,000.[8] During 2001 the benefits were reduced so that under the gold plan routine doctor visits and prescriptions were not covered.[9]

The amount of the monthly payment made by a subscriber to the newsletter is determined by the number of units and the program selected. For example, a family of three or more (three units) gives $405 per month for the gold program, $202.50 per month in the silver program and $101.25 per month in the bronze program.[10] If a subscriber fails to make monthly payments, they are dropped as a subscriber and cannot submit medical bills.[11]

The contents of the prequalification or application form used by the newsletter has changed from year to year. However, the 2000 application included a Checklist of Understanding which required a subscriber to initial various paragraphs. An application signed on August 16, 2000 had a checklist which provided, in part, as follows:

> *Before we can accept you as a participating subscriber, we must be assured that you fully understand the nature of our ministry. Various state insurance regulators have asked us to retain a signed checklist of understanding from each subscriber. Consequently, please read and complete this form and return it as soon as possible. If you do not understand any of the points listed below, please call our information line at 1-800-269-4030 for a complete explanation.*
>
> Please initial the following and sign below
>
> * * *
>
> ___ 2. I understand the Christian Brotherhood Newsletter ministry is not insurance and no guarantees are given to those who participate.
>
> ___ 3. I understand that I am under no compulsion to give to the medical needs of other participants in the Newsletter ministry.
>
> ___ 4. I understand that I have no legal right to receive money from the Newsletter itself or other participants if I have a medical need which I would like to share with other participants.
>
> * * *
>
> ___ 6. I understand that if I ever have any medical needs, the risk of their payment remains on me whether or not other participants may send me money to help share those needs.
>
> ___ 7. I understand that if my medical needs are ever submitted to the Newsletter for publication, they may accept or reject them for publication as they see fit.
>
> ___ 8. I understand that the Christian Brotherhood Newsletter is not approved or endorsed by the Department of Insurance in my state and claims or losses are not protected by the state guaranty fund.[12]

* * *

Recent applications have also contained notices for residents of various states warning that the newsletter was not issued by an insurance company.

Prior to 1999 the subscribers would submit their medical bills to CBN which would then review and publish the names of subscribers with "eligible" medical bills in the newsletter. Other subscribers would then send their specified monthly payment directly to the designated subscriber.[13] Since September 1999, however, all monthly payments from subscribers have been made directly to Respondents own "escrow account."[14] When a subscriber incurs medical expenses the subscriber then fills out a Needs Processing Form according to directions supplied by CBN and submits it.[15] CBN then determines which medical bills are eligible for payment according to its published "Guidelines" and the newsletter then pays subscribers for their eligible medical bills directly.[16] CBN will also publish the needs of subscribers that do not meet the Guidelines in the newsletter so that other subscribers can send them money directly.[17]

Medical bills or "needs" are paid or "published" according to the Guidelines, which set forth in detail what type of medical bills will be paid. Changes to the Guidelines are proposed by CBN and voted on by the subscribers.[18] The Guidelines state that they do not provide in any way a legal contract or guarantee of payment to participants for medical needs submitted. The Guidelines set out in detail who qualifies as participants, what pre-existing conditions are eligible, what medical facilities qualify, what procedures qualify and include special rules for certain conditions such as heart disease and cancer.[19] Although CBN and its Guidelines indicate that a subscriber is not guaranteed payment of any medical claim, the Respondents have never refused to pay medical bills that are eligible under the Guidelines.[20]

From October 1989 to April 2002, CBN received $844,581 from Minnesota subscribers and paid out $1,749,518 to Minnesota subscribers. As of April 2002 the unpaid "needs" of active Minnesota subscribers totaled $193,260.[21]

CBN instituted a "utilization and review" process beginning January 1, 2000. This process involves registered nurses working with subscribers to assure that the health care being provided is appropriate and cost effective.[22] The process includes a precertification for the health care as well as a concurrent review, a retrospective review, discharge planning and case management.[23] A subscriber may appeal a determination that a medical need is inappropriate or unnecessary.[24]

On April 25, 2001, CBN was placed into receivership by an Ohio court. The Ohio Attorney General, with the cooperation of some members of CBN's Board of Trustees, alleged that two of the Respondents' trustees had allowed unpaid "needs" of subscribers to rise to more than $34,000,000 and allowed claims payments to be delayed by an average of 18 months or more. The Attorney General stated that the newsletter had revenues of more than $4,000,000 per month and affected the health care needs of approximately 40,000 individuals.[25] By the fall of 2001 the court-

appointed operating receiver had paid all 1999 bills. As of December 2002 there were still bills outstanding from the year 2000.[26]

The Department previously investigated CBN's operation in Minnesota in 1993. A letter dated November 8, 1993, and signed on behalf of the Commissioner of Commerce, provided in part as follows:

> "This is to advise that based on our review of the available evidence we have elected to conclude our investigation without initiating administrative action. You should be advised that our decision not to initiate administrative action at this time, is based entirely upon the information we have received describing the structure and operation of your program. If this information is incorrect or incomplete, the Department may reopen this matter at a future date.
>
> * * *
>
> In addition, we continue to be concerned that members of the program could be led to believe that they are participating in a 'conventional' insurance arrangement where liability is assumed by third parties. Therefore, we would encourage you to increase the level and nature of disclosure in your communication with your subscribers to insure that they understand their continuing liability for their medical expenses in the event those expenses are not satisfied through the voluntary donations of fellow subscribers."[27]

In a letter to the Department dated November 17, 1993, counsel for CBN stated that it would take seriously the suggestion that the level and nature of disclosure to subscribers be increased.[28] The newsletter has operated freely in Minnesota from 1993 until the issuance of the Cease and Desist Order in this matter on June 13, 2001.

The Respondents' submitted an affidavit of James E. Ulland, a former Commissioner of Commerce, as expert testimony concerning whether or not the newsletter operation fell within the definition of insurance. He states that the CBN program does not create an enforceable obligation on the part of CBN to reimburse a subscriber for medical bills and that CBN materials contain clear disclosures that the problem is not intended to be a substitute for insurance. Mr. Ulland also concludes that:

> The program lacks the most essential elements of an insurance contract, namely: this is not an enforceable agreement, the acceptance by one of the parties of the risk of the other is not present, the intention of the parties to be bound is not present, the reasonable expectation of payment is not present, in fact, the expectation of payment is specifically disavowed by both parties, and both parties agree that the relationship is not a contractual one.[29]

John and Lynne Cooke are residents of Bloomington, Minnesota and have been subscribers to the newsletter since the late 1980's. They have contributed to the

newsletter month by month for almost 15 years. They have never asked to have a medical need of their own compensated by CBN even though they have had medical expenses. The Cookes are members of the Cedar Valley Church in Bloomington, which is an Assemblies of God church. One of the church's beliefs is divine healing, namely the belief that God heals believers. The church stresses the need to abstain from alcohol, tobacco and drugs but believes that the use of medicine and physicians is compatible with divine healing.[30] The Cookes home-schooled their children during their high school years and believe in Bible-based teaching. They believe in "clean living" and have not had health insurance since 1975, believing that it would discourage people from living cleanly and consistently with the scriptures. They acknowledge that there is no guarantee that the newsletter will reimburse them for any medical needs. If the Cookes were not members of CBN, they would likely assist people with medical needs through their church.[31] The Cookes were granted permission to file a brief in this proceeding setting out their constitutional arguments concerning the Department's attempted regulation of the newsletter.

Summary Disposition

A Motion for Summary Disposition is the administrative equivalent to a Motion for Summary Judgment in court practice. Summary Judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[32] A genuine issue is one that is not sham or frivolous.[33] A material fact is a fact the resolution of which will affect the result or outcome of the case.[34] Where no factual disputes are raised the resolution of which might clarify the application of law, summary judgment is proper.[35] In this case the parties agree that there is no genuine issue of material fact but disagree as to the proper application of law. This case is therefore appropriate for summary disposition.

Minnesota Insurance Statutes

It is unlawful to transact the business of insurance in Minnesota without a license from the Commissioner of Commerce unless an entity is specifically exempted.[36] It is also unlawful for any company to enter into a contract of insurance as an insurer or to transact insurance business in this state without a certificate of authority.[37] The Respondents are neither licensed to transact the business of insurance in Minnesota nor do they have a certificate of authority to transact insurance business in this state.

Minnesota law defines "insurance" as follows:

> "Insurance" is any agreement whereby one party, for a consideration, undertakes to indemnify another to a specified amount against loss or damage from specified causes, or to do some act of value to the assured in case of such loss or damage.[38]

"Indemnify" has been defined in Minnesota case law as "to restore the victim of a loss, in whole or in part, by payment, repair, or replacement."[39]

The Department argues that at least since September 1999 CBN has been indemnifying its subscribers by paying them directly, according to the Guidelines, when they incur medical bills. There is no indication that the newsletter has ever not paid eligible medical bills. Some references in CBN's literature might lead a subscriber to think that his or her bills would be paid without fail. A 1999 marketing letter stated that "subscribers have met every qualifying medical need of fellow subscribers" and "more than $1,000,000 in medical needs are being met each week."[40] The "Fact Pak" states that "For nearly 20 years, subscribers have been sharing 100% of qualifying medical bills."[41] It also states that: "When you have a need … the newsletter reviews your bills … Funds will then be forwarded to you for you to pay your medical bills."[42] The gold plan was represented by the newsletter to provide 100% of qualifying bills and testimonials in the Fact Pak speak of having their medical bills completely met.[43]

Additionally, when the Respondents were placed into receivership they agreed to pay all of the subscribers outstanding medical bills for 1999 and 2000. The Department asserts that the newsletter has agreed to pay and has paid all qualifying medical bills in accordance with its Guidelines and therefore has agreed to indemnify its subscribers for their medical bills within the meaning of the statute.

The Department contends that a broader definition of insurance is also contained in the statute since it includes an agreement whereby one party, for consideration, undertakes "to do some act of value." It is undisputed that the subscribers to the newsletter make a monthly payment to CBN. Subscribers cannot receive money for their medical bills if their payments are not current. If a subscriber misses payment for approximately three months they are "dropped" and would need to reapply to be regarded as a subscriber.[44] The payments constitute consideration. The Department argues that CBN performs an act of value for the subscribers in two respects. First, it pays qualifying medical bills. Secondly, it also publishes the name of subscribers with medical bills, that do not qualify for payment under the Guidelines, in its newsletter. Other subscribers may then contribute to help defray these medical bills.

CBN's operation of the newsletter has a number of attributes of "insurance." The Guidelines, which the Department compares to an insurance policy, are detailed and are strictly enforced.[45] CBN offers a varied level of benefits, varied deductibles, a policy limit of $125,000, the pooling of premiums in an escrow account, monthly premiums and a "utilization and review" process to manage claims. The Department compares CBN's needs processing form to a claim form, and its explanation of publication to an explanation of benefits. The Department suggests that the newsletter is marketed as a substitute for insurance since it is described as a "medical plan" that is an alternative to conventional insurance.[46] Additionally, subscribers sometimes have referred to CBN and the newsletter as an "insurance plan" or "medical coverage"[47].

In response, the Respondents point out that throughout the information it provides about the newsletter, including the newsletter itself, its website, the Fact Pak and the subscriber application, it is made clear that neither the subscribers or CBN are entering into a contract of insurance. Furthermore, subscribers specifically agree that there is no insurance contract and that payments made by subscribers or by CBN are

voluntary. The Respondents argue that without any agreement and with an explicit disclaimer of agreement, their operation cannot fall within the statutory definition of insurance. They argue that subscribers and CBN disavow a basic fundamental element inherent to the formation of any contract, namely, that the parties promise to do something.[48]

The Respondents also point to a line of antitrust cases decided by the U.S. Supreme Court which cite the "true underwriting of risks" as the earmark of insurance. The cases hold that if there is no real risk of loss, then there was no selling of "insurance."[49] They argue that insurance must have the effect of transferring a policyholder's risk.[50] Although the Minnesota statutory definition of insurance does not explicitly refer to assumption of risk, it can be implied from the language and it is a common characteristic of insurance that can be considered as one factor in the resolution of this case. The Respondents also refer to the opinion of former Commissioner Ulland that CBN is not transacting the business of insurance because there is no assumption of risk, no promise to pay, no shifting of the risk and no guarantees.[51]

Supreme Court Case Law

Two State Supreme Courts have considered the question of whether the Respondents' operation of the newsletter constitutes insurance. In a 1998 decision the Supreme Court of Iowa decided that the newsletter's plan for distribution of medical expenses among its subscribers was not insurance under Iowa law.[52] Because Iowa statutes do not contain a definition of "insurance", the Iowa Court applied the following case law definition:

> [a] contract is one of insurance if it meets the following test: one party, for compensation, assumes the risk of another; the party who assumes the risk agrees to pay a certain sum of money on a specified contingency; and the payment is made to the other party or the party's nominee.[53]

The Iowa Insurance Division argued that CBN had made an implied promise to pay a subscriber's health care costs.

The Iowa Supreme Court observed that a company could be found to be engaged in the insurance business even though it expressly disclaims any intention to sell insurance. But the Court also observed that:

> However, even if a program looks like insurance, it is not necessarily so. The principal inquiry is not how the program appears but whether the risk of payment for medical expense is assumed by the promoter. [citing cases] In fact, to be considered insurance, the assumption of risk by the promoter must be the "principal object and purpose of the program." Appleman, Sec. 7002, at 14.

The Court determined that the Insurance Division had failed to establish any assumption of risk or an implied promise to pay.

The Department points out that at the time of the Iowa decision the operation of the newsletter involved direct payments from one subscriber to another for medical bills. That method of operation changed in 1999 at which time all subscriber payments were made to CBN's escrow account. The Department sees payment from one subscriber to another as the "primary basis" for the Iowa decision. However, it appears that the Court saw it as only one factor; the "principal inquiry" was whether risk was assumed.

In 1993 the Delaware Supreme Court, in an unpublished decision, summarily affirmed a Delaware trial court decision which upheld the decision of the Delaware Insurance Commissioner that CBN's operations constituted insurance.[54] The Delaware statute at the time of the decision defined "insurance" as:

> a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils, called risks, or to pay or grant a specified amount for determinable benefits in connection with ascertainable risk contingencies or to act as surety.[55]

The Delaware Insurance Code also provided, however, as follows:

> (d) Notwithstanding any other provision of the law, and except as provided herein, any person or other entity which provides coverage in this State for medical, surgical, chiropractic, physical therapy, speech pathology, audiology, professional mental health, dental, hospital or optometric expenses, whether such coverage is by direct payment, or reimbursement or otherwise, shall be presumed to be subject to the jurisdiction and authority of the Commissioner…[56]

The Delaware court found that "this well defined program provides for the payment, albeit indirect, of specified amounts toward certain types of medically related expenses." The Court determined that CBN's operations fell within the statutory language of "whether such coverage is by direct payment, reimbursement or otherwise." The Court affirmed the administrative hearing officer's determination that when CBN accepts an applicant for membership, a contract is clearly implied.[57] The usefulness of this case as a precedent in Minnesota is limited by two factors. First, Delaware's statutory definition (any entity which provides coverage for medical expenses) is much broader than the Minnesota statute. Secondly, the Supreme Court's summary opinion contains very little analysis to explain its holding.

Application of the Minnesota Statute

Although case law from other states is helpful in arriving at a decision in this matter, the main inquiry must be the application of the Minnesota statute to the facts of Respondents' operation in the State of Minnesota. Fundamental to that inquiry is a determination of the legislature's intent.[58] In that regard the Respondents point to certain exemptions in the Minnesota Insurance Code for fraternal benefit or benevolent societies such as the Masons, the Oddfellows or the Elks.[59] They suggest these

exemptions evidence an intent not to regulate operations like CBN. Additionally, Respondents point to statutory language governing religious societies in Minnesota law that provides as follows:

> A religious society, religious association, or religious corporation may, when authorized by its members, support and pay benefits to its ministers, teachers, and other employees, or those of a congregation or educational, benevolent, charitable, or other body affiliated with it or under its jurisdiction; pay benefits to their surviving spouse, children or other dependents or beneficiaries; collect contributions and other payments; and create, invest, manage and disburse necessary endowment, reserve and other funds for these purposes.
>
> The insurance laws of this state do not apply to the operations of a society, association or corporation under this section.[60]

The Respondents argue that in light of these exemptions the legislature did not intend to apply insurance law to its religious faith based ministry. However, the record does not support the assertion that the operations of the Masons or the Oddfellows are similar to that of CBN or that their activities are within the statutory definition of insurance. Additionally, since the religious association statute applies only to employees of these organizations, it is difficult to use it to divine legislative intent as to the Respondent's operation.

The Respondents assert that the 1993 letter from the Department to Respondents advising them that it had decided not to initiate administrative action was a determination that CBN's operation did not constitute insurance under Minnesota statutes and that that determination should preclude the Department from proceeding with this matter. However, the letter specifically advised CBN that the matter might be reopened in the future if the information was found to be incorrect or incomplete. CBN has modified its operations since 1993. Neither can it be said that *res judicata* or collateral estoppel should apply to this case since there was no final adjudication on the merits in 1993.[61] Likewise, *stare decisis* is generally not applied to administrative decisions, although an agency may be obligated to explain a departure from precedent.[62] Nonetheless, the letter has some relevance in that it indicates that when the Department looked at similar circumstances 10 years ago, it came to a different conclusion, and decided not to initiate administrative action against CBN.

The Cookes suggest that the Department is equating repeated charitable giving with an agreement, and confusing the payments made by CBN with an agreement to indemnify. However, repeated gifts do not necessarily create a contract or a right to payment. Rather, an intention to be bound must be ascertainable.[63] The Cookes also argue that if the Department's argument is taken to the extreme it would regulate the solicitation of prayer and regulate other religious activity, thereby rendering the Department's interpretation unconstitutionally overbroad.[64] It appears, however, that the Department does not seek to stretch its enforcement authority to this extent.

The record is devoid of complaints from any Minnesota CBN subscribers concerning the operation of the newsletter. Rather, the Respondents have submitted affidavits from subscribers in which they acknowledge that they understand that CBN does not assume any risk of payment of subscribers' medical bills and that the newsletter is not insurance. The affiants state that they have subscribed to the newsletter not as a substitute for insurance, but as an exercise of their religious beliefs as Christians. Additionally, 19 subscribers attended the oral argument in this matter in support of CBN's position.[65] The Department points out that even in the absence of complaints from existing subscribers it is responsible for the protection of those who might be solicited. While that is true, the lack of complaints is a significant factor that demonstrates that CBN's operation in Minnesota is not deceptive and demonstrates that its subscribers do understand that they are not promised payment of their medical expenses.

The Department has established that CBN's operation resembles insurance. But it must also establish, in the words of the statute, that CBN has made an agreement to indemnify its subscribers for losses due to medical expenses. The record does not support a conclusion that an agreement exists. CBN's explanatory information specifically states that it is not insurance and that payment of medical bills is not guaranteed. Its application form contains a lengthy check list to be initialed by the applicant that documents the subscribers understanding that the newsletter is not insurance, that a subscriber has no legal right to payment of medical expenses, that the risk of payment of medical bills remains on a subscriber, and that the newsletter is not approved by state insurance regulators or backed up by a state guaranty fund.[66] Additionally, as states have asked CBN to include specific disclaimers in its application, it has done so. For example, the 2000 form contains the following disclaimers, among others:

> **Especially for South Dakota residents**: The Brotherhood program is not an insurance contract. This plan does not fall under the jurisdiction of the South Dakota Division of Insurance nor is the plan covered under the South Dakota guaranty fund.
>
> **Especially for Wisconsin Residents**: Attention: This publication is not issued by an insurance company nor is it offered through an insurance company. This publication does not guarantee or promise that your medical bills will be published or assigned to others for payment. Whether anyone chooses to pay your medical bills is entirely voluntary. This publication should never be considered as a substitute for an insurance policy. Whether or not you receive any payments for medical expenses, and whether or not this publication continues to operate, you will always remain responsible for the payment of your own medical bills.[67]

These items in the application and the explanatory materials are not consistent with an agreement between the parties. Rather, they explicitly and clearly negate the existence of any agreement or the existence of "insurance."

The Department is essentially arguing that CBN makes an implied promise to pay medical bills by collecting "premiums" and consistently paying "claims." The Iowa Supreme Court could not find any implied promise to pay, however. And it appears that since that decision CBN has added to its "checklist of understanding" and its disclaimers. The 1999 change that required subscribers to send payments to the CBN escrow account directly is one more factor that causes CBN to resemble insurance. But it does not impact the existence of an agreement or affect whether or not CBN accepts any risk. There is no written intention of the parties to be bound.

Constitutional Arguments

Neither an agency head nor an Administrative Law Judge has authority to declare a statute or rule unconstitutional since that power is vested solely in the judicial branch of government.[68] However, it has also been held that an administrative agency may resolve constitutional challenges to the application of a statute in a particular case, taking into account relevant judicial decisions.[69] This case involves the latter situation. Should the Commissioner determine that the Respondents are transacting the business of insurance in Minnesota, he will need to decide if regulation can be accomplished consistent with constitutional requirements. The Cookes and the Respondent argued that when a statute is reasonably susceptible to two interpretations, one of which implicates the State or Federal Constitution, the statute must be construed to avoid a constitutional conflict.[70] The question then in this case is not whether the insurance statutes are constitutional but rather whether they are consistent with constitutional requirements as applied to the Respondents in this case.

Both the Respondents and the Cookes argue in their written submissions that the Department's attempt to regulate CBN as an insurance company violates the First Amendment to the Federal Constitution, as well as the Minnesota Constitution's freedom of conscience clause. The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof… ." The free exercise clause has been made applicable to the states by incorporation into the Fourteenth Amendment.[71] The parties are in agreement that the effect of the free exercise clause upon state regulation of conduct was substantially altered by the case of Employment Division, Department of Human Resources of Oregon v. Smith.[72] Prior to Smith a free exercise inquiry asked whether government had placed a substantial burden on the observation of a central religious group belief or practice and if so whether a compelling governmental interest justified the burden.[73] In Smith the U.S. Supreme Court decided that the First Amendment did not prohibit the application of criminal law to the use of peyote for sacramental purposes at a ceremony of the Native American Church. The Court observed that:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.[74]
>
> * * *
>
> Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." [Citing United States v. Lee, 455 U.S. 252, 263, n. 3, 102 S. Ct. 1051, 1058 n. 3, 71 L. Ed. 2d 127 (1982)].[75]

* * *

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." [Citing Lyng v. Northwest Indian Cemetery Protective Association, 45 U.S. 439, 451 (1988)][76]

The Cookes and the Respondents claim, however, that even under the holding in Smith their conduct is protected by the First Amendment because Minnesota's insurance statutes are not facially neutral. They base this assertion upon the exceptions in the statutes for fraternal benefit societies, some of which are religious. However, there has been no showing that the excepted organizations have operations similar to CBN and additionally, it appears that the Department does regulate some religiously affiliated fraternal benefit societies.[77] The statutory scheme is facially neutral in that it appears to deal with similarly situated entities in a substantially similar manner.

The Cookes and the Respondents also assert that they fall within an exception recognized in Smith for "hybrid" cases where more than one constitutional right is involved. Even after Smith, a hybrid rights case will receive strict scrutiny under the free exercise clause. For example in Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton,[78] the U.S. Supreme Court found that an ordinance requiring a permit for the distribution of religious periodicals by Jehovah's Witnesses violated both the free exercise clause and the free speech clause of the First Amendment. The ordinance was therefore subjected to strict scrutiny by the Court.[79] Since the solicitation of contributions is protected free speech,[80] it appears that this case involves more than one constitutional right and would not be decided under the analysis applied in Smith. The hybrid analysis is similar to the analysis employed under the Minnesota Constitution. That analysis is set out below.

Whatever the effect of the First Amendment on the Minnesota insurance statutes as applied to the Respondents, the analysis must also consider the application of the Minnesota Constitution since it is clear that the Minnesota Constitution provides greater protection in this area than does the U.S. Constitution. Article 1, Section 16 of the Minnesota Constitution states in relevant part:

> …The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support a place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, …

The Minnesota Supreme Court has recognized that this language is "of a distinctively stronger character than the federal counterpart."[81] The Court held that once a claimant has demonstrated a sincere religious belief, the State should be required to demonstrate that public safety cannot be achieved by proposed alternative means. In a concurrence Justice Simonett noted that "Our decision today, it seems to me, says no more than that a secular law of general application is not exempt, as it is under the First Amendment when no other constitutional rights are involved, from examination under our liberty of conscience clause."[82]

In a later case (Hill Murray), [83] the Minnesota Supreme Court indicated that it would retain the (prior federal) compelling state interest balancing test in its application of the Minnesota freedom of conscience clause. The four prongs of the test are whether the objector's belief is sincerely held, whether the state regulation burdens the exercise of religious beliefs, whether the state interest in the regulation is overriding or compelling, and whether the state regulation uses the least restrictive means. In Hill Murray, the Court found that the state's interest in the application of a labor relations statute to a religiously affiliated high school outweighed what it characterized as a minimal infringement on Hill Murray's exercise of religious beliefs.

The Department does not dispute that the Cookes' religious beliefs are sincerely held. Their belief is supported by the positions of their church. But a belief need not be shared by all members of a religious organization, anyway in order to be found to be sincere.[84]

The parties do disagree as to whether or not the Department's proposed regulation of CBN would burden the exercise of the Cookes' religious beliefs. The Cookes argue that regulation by the Department would mean binding contracts with CBN subscribers and that this would require the Cookes to put their faith in the secular world rather than in God. This record demonstrates that the ministry offered by CBN is a vehicle for the expression of Christian faith by those who subscribe. Some subscribers, such as the Cookes, contribute monthly but make no medical expense claims. They do not use the newsletter as insurance, but as a means of giving to others in need. The affidavits submitted by Minnesota subscribers state that subscription to the newsletter is a voluntary expression of Christian faith that allows subscribers to practice their sincere belief that the Bible requires them to share one another's burdens. They describe participation in the newsletter as an act of worship. John Cooke states that the newsletter allows him to fulfill his obligation to God to contribute to the medical needs of other Christians.[85] He seeks to avoid a secular answer to medical expenses. The fact that subscribers are willing to make monthly payments to CBN with a clear understanding that they are promised nothing in return, indicates that there is a strong non-economic factor involved.

The Department suggests that subscribers would be able to donate to the medical needs of Christians elsewhere, for example through their church. Similarly, the Jehovah Witnesses could distribute religious literature in another village. But the case law suggests that the free exercise of religion includes the right to select the form of worship, at least where the state interest in regulation is not strongly compelling.

The Cookes point to the Minnesota Court of Appeals' case of Gerachi v. Eckankar for support.[86] In Gerachi the Court held that application of the State Human Rights Act to the employment practices of a church violated the freedom of conscience clause in the Minnesota Constitution. Although noting that eradication of discrimination is a compelling state interest, it found that application of the Act to Eckankar would excessively burden its religious beliefs because it would require the Court to question Eckankar's monitoring of Gerachi's adherence to church doctrine and its reasons for her excommunication. Likewise, in this case the Department could be faced with determining whether subscribers are Christians "by biblical principles."

The Department contends that it has a compelling interest in protecting the public from unlicensed insurance companies. It is required by statute to oversee requirements such as financial stability, policy provisions and the payment of claims by insurance companies. The Cookes argue that the Department has shown no compelling or overriding interest in light of the fact that the Cookes, who are the consumers to be protected, are seeking an exemption from regulation. And, as discussed above, the affidavits of subscribers indicate that they do not believe that regulation is necessary. Additionally, based upon the number of Minnesota subscribers, it does not appear that the newsletter appeals to a large number of Minnesota residents. Nevertheless, as the Department points out, Respondents will be able to market its operation to all Minnesotans in an unregulated manner if their interpretation prevails. The Department has made an adequate, but not overriding, showing of the importance of regulation.

Under the Hill Murray test the Department must demonstrate that it cannot achieve its compelling interest through a less restrictive alternative means. The Cookes argue that an alternative means is clearly available and has been employed by other states. Several states have required explicit warnings and disclaimers in CBN's correspondence with their citizens.[87] Although the Department suggests that other states may have statutory authority to allow disclaimers in lieu of regulation, no support was provided for this assertion. It appears that the Department could agree to interpret the insurance statutes to forgo regulation if appropriate disclaimers, like those for Wisconsin and South Dakota, were used by CBN, Inc. Although this would not allow Minnesota consumers to have recourse to the Department to handle complaints, it appears that the explicit disclaimers used by CBN have avoided complaints in the past, and presumably should do so in the future. The Department has not shown how a warning would not suffice to meet its interest in protecting consumers and the public safety.

The analysis set out by the Court in Hill Murray and Gerachi is a balancing test. In this case the religious beliefs are sincere and the Respondents and the Cookes have demonstrated that regulation would burden the exercise of their beliefs. While the Department has shown the importance of regulation, it has not established that regulation of CBN as an insurance company is an overriding or compelling state interest. Nor has it demonstrated that regulation as an insurance company is the least restrictive alternative. In balancing the factors, and taking into consideration the Commissioner's obligation to interpret the statutes under his jurisdiction to avoid a

constitutional conflict, the infringement on the sincere religious beliefs of CBN and its subscribers outweighs the Department's interest in regulation.

G.A.B.

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[1] Ex. A (lettered exhibits refer to Respondents tabs A-I).
[2] Ex. B.
[3] Ex. 4, pp. 4597-4622 (numbered exhibits are those submitted by the Department).
[4] Ex. C, p. 148.
[5] Ex. C, p. 149.
[6] Ex. C, Ex. 5.
[7] Ex. 6, p. 352.
[8] Ex. 6, p. 352-353; See also Ex. D.
[9] Ex. C, p. 153; See Jansen affidavit, Ex. 9, for the 2003 Guidelines.
[10] Ex. C, p. 153-154.
[11] Ex. 3, pp. 74-76.
[12] Ex. 5, p. 1288 (Italics in original); See also, Jensen affidavit, Ex. 8.
[13] Ex. 3, p. 59-60, Ex. E.
[14] Ex. 3, pp. 60-62, 96; Ex. 13-15.
[15] Ex. 31, Cookes' Ex. 17.
[16] Ex. 3, pp. 96, 109, 114; Ex. 7.
[17] Ex. 20, p. 4769, Ex. 23, 24.
[18] Ex. 3, pp. 66, 81, 83-85, 96, 109.
[19] Ex. 7-10, Jensen affidavit, Ex. 9, sets out the 2003 Guidelines.
[20] Ex. 3, p. 105.
[21] Ex. 4.
[22] Ex. 16, p. 4938.
[23] Ex. 17, p. 4951.
[24] Ex. 17, p. 4952.
[25] Ex. 1, pp. 180, 187; T. 24.
[26] Ex. 2, Ex. 3, pp. 121-122, 124.
[27] Ex. F.
[28] Ex. G.
[29] Affidavit of James E. Ulland.
[30] Jansen affidavit, Ex. 2.
[31] Cooke affidavits.
[32] Sauter v. Sauter, 244 Minn. 482, 70 N.W. 2d 351, 353 (1955); Louwagie v. Witco Chemical Corp. 378 N.W. 2d 63, 66 (Minn. Ct. App. 1985).
[33] A&J Builders, Inc. v. Harms, 288 Minn. 124, 179 N.W. 2d 98 (1970).
[34] Zappa v. Fahey, 310 Minn. 555, 556, 245 N.W. 2d, 258, 259-60 (1976).
[35] Holiday Acres No. 3 v. Midwest Federal Savings & Loan Assoc. of Mpls., 308 N.W. 2d 471, 480 (Minn. 1981).
[36] Minn. Stat. § 60A.07, subd. 4.
[37] Minn. Stat. § 72A.41, subd. 1 and 2.
[38] Minn. Stat. § 60A.02, subd. 3(a).
[39] Hanson v. Thom, 636 N.W. 2d 591, 594 (Minn. Ct. App. 2001).
[40] Ex. 19, p. 3055.
[41] Ex. 18, p. 148.
[42] Ex. 18, p. 149.
[43] Ex. 18, p. 147.
[44] Ex. 3, pp. 75-76.
[45] Ex. 25, Ex. 26.

[46] Ex. 22, p. 743; Ex. 28.
[47] Ex. 18, p. 147; Exs. 32-40.
[48] Carlson v. Krantz, 172 Minn. 242, 245, 214 N.W. 2d 928-29 (1927).
[49] SEC v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65, 73 (1959); Group Life and Health Ins. Co. v. Royal Drug Company, Inc., 440 U.S. 205, 211-12 (1979).
[50] Dana Corp. v. Blue Cross & Blue Shield Mutual of Northern Ohio, 900 2d 882 (6th Cir. 1990), rehearing denied (1990).
[51] The Administrative Law Judge has accepted Mr. Ulland's testimony, as well as that of Professor Clarence Rose, as argument rather than expert testimony since opinions regarding legal issues are ordinarily not admissible (*Safeco Ins. Co. of America v. Dain Bosworth, Inc*., 531 N.W. 2d 867, 873 (Minn. Ct. App. 1995)) and the Administrative Law Judge and the Commissioner are capable of reaching a legal conclusion without expert assistance.
[52] Barberton Rescue Mission, Inc., dba The Christian Brotherhood Newsletter v. Insurance Division of the Iowa Dept. of Commerce, 586 N.W. 2d 352 (Iowa 1998).
[53] State v. Schares, 548 N.W. 2d 894, 896 (Iowa 1996).
[54] Ex. 45; Christian Brotherhood Newsletter v. Williams, 634 A. 2d 938, 1993 WL 366557 (Del. Supr.)
[55] Ex. 45, p. 7.
[56] Ex. 45, p. 6.
[57] Ex. 45, p. 9.
[58] Minn. Stat. § 645.16.
[59] Minn. Stat. § 64B.38.
[60] Minn. Stat. § 315.40.
[61] Graham v. Special School Dist. No. 1, 472 N.W. 2d 114 (Minn. 1991).
[62] In Re Whitehead, 399 N.W. 2d 226 (Minn. Ct. App. 1987).
[63] Carlson v. Krantz, 172 Minn. 242, 245-46, 214 N.W. 2d 928, 929 (1927).
[64] Cookes Reply Memorandum.
[65] T. 56.
[66] P. ___, supra.
[67] Ex. 5, p. 1288.
[68] Neeland v. Clearwater Memorial Hospital, 257 N.W. 2d 366, 368 (Minn. 1977); In re Rochester Ambulance Service, 500 N.W. 2d 495 (Minn. Ct. App. 1993).
[69] Petterssen v. Commissioner of Employment Services, 306 Minn. 542, 543, 236 N.W. 2d 168, 169 (1975); Jackson Co. Educational Assoc. v. Grass Lake Community, 95 Mich. App. 635, 641, 291 N.W. 2d 53, 56 (1980); Richardson v. Board of Dentistry, 913 S.W. 2d 446 (Tenn. 1995).
[70] See e.g. State on behalf of Forslund v. Bronson, 305 N.W. 2d 748, 751 (Minn. 1981).
[71] Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940).
[72] 494 U.S. 872 (1990).
[73] Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S. Ct. 2136, 2149, 104 L. Ed. 2d 766 (1989).
[74] 494 U.S. at 878-879.
[75] 494 U.S. at 879.
[76] 494 U.S. at 885.
[77] Hanson Affidavit.
[78] 536 U.S. 150, 122 S. Ct. 2080 (2002).
[79] See also Miller v. Reed, 176 Fd. 3rd 1202, 1207-08 (9th Cir. 1999).
[80] Cantwell, supra.
[81] State v. Hershberger, 462 N.W. 2d 393, 397 (Minn. 1990) (Hershberger II).
[82] 462 N.W. 2d at 400.
[83] Hill Murray Federation of Teachers v. Hill Murray High School, 487 N.W. 2d 857, 865 (Minn. 1992).
[84] State v. Hershberger, 444 N.W. 2d 282, 286 (Minn. 1989) (Hershberger I).
[85] Affidavit of John Cooke.
[86] 526 N.W. 2d 391 (Minn. App. 1995) review denied March 14, 1995.
[87] Jansen Affidavit, Ex. 8.